83 - 1350

No.

IN THE SUPREME COURT OF THE UNITED STATES

FEBRUARY TERM, 1984

UNITED STATES OF AMERICA, RESPONDENTS

VS.

KENNETH E. MOORE, III and
KENNETH E. MOORE, JR., PETITIONERS

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE UNITED STATES COURT OF APPEALS IN AND FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the misconduct of the Assistant United States Attorney committed during the prosecution of this case so violated the defendants' constitutional rights so as to warrant a dismissal of the indictment.

2. Whether it was incumbent upon the defendants in this case to prove prejudice as a result of such misconduct.

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KENNETH E. MOORE, JR., PETITIONERS

JOINT PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

Petitioners, Kenneth E. Moore, III and Kenneth E. Moore, Jr., were jointly indicted and tried in the United States District Court in and for the Northern District of New York. Petitioners appealed their judgment of conviction to the United States Court of Appeals in and for the Second Circuit.

Petitioners herein filed a Joint Petition for a Writ of Certiorari to review the Order and Opinion of the United States Court of Appeals for the Second Circuit entered December 15, 1983.

OPINIONS BELOW

The opinion rendered by the District Court was on a pretrial motion to dismiss the indictment; this opinion, not reported, is reproduced and set forth in Appendix B to this Petition. The opinion and order of the Court of Appeals, also unreported, is reproduced and set forth in Appendix A to this Petition.

JURISDICTION OF THIS COURT

The Order and Opinion of the United States Court of Appeals for the Second Circuit was entered on December 15, 1983 (Appendix A, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and

district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Constitutional questions sought to be reviewed here were raised in the United States District Court in and for the Northern District of New York by Petitioners' timely pretrial motion to dismiss the indictment. In this motion, petitioners averred that their Fourth, Fifth and Sixth Amendment United States Constitutional rights were violated when the Assistant United States Attorney assigned to prosecute the case wrongfully obtained, reviewed, copied, withheld, and failed to disclose his possession of a carton of documents which contained defense material consisting of correspondence between defendants and defendants' attorneys; charts and summaries prepared by the defense team in preparation for trial; and memoranda prepared by the defense team containing defense trial strategy.

The motion was submitted and argued and a hearing on the issue was held in District Court. The District Court judge denied the motion to dismiss the indictment. A trial was held in

District Court in November and December of 1982. Petitioners were found guilty of a portion of the counts on the indictment. Petitioners filed a Notice of Appeal with the United States Court of Appeals for the Second Circuit. The Second Circuit rendered a decision and order duly filed on December 15, 1983.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH DECISIONS OF FEDERAL COURTS ON IMPORTANT ISSUES AFFECTING FEDERAL CONSTITUTIONAL RIGHTS.

This very Court has long held that a prosecutor must adhere to high standards and principles and further that prosecutorial misconduct may merit reversal or dismissal when a defendant is deprived of a constitutional right. Berger v. United States 295 U.S. 78 (1935). Federal Courts have dismissed indictments both prior to and during criminal trials because of prosecutorial misconduct. U.S. v. Agurs 427 U.S. 97 (1975); Mooney v. Holohan 294 U.S. 103 (1934); U.S. v. Bess 593 F.2d 749 (6th Cir., 1979); U.S. v. Fields 592 F.2d 638 (2d Cir., 1978); U.S. v. Jacobs 531 F.2d 87 (2d Cir., 1976); U.S. v. Estepa 471 F.2d 1132 (2d Cir., 1972).

The Second Circuit in Fields held:

> "The extreme sanction of dismissal of an indictment is justified in order to achieve one or both of two

> "objectives: first, to eliminate prejudice to a defendant in a criminal prosecution, second, to 'help translate the assurances of U.S. attorneys into consistent performance by their assistants.'"

The facts are undisputed and uncontroverted. The prosecution took, reviewed, copied and withheld defense material. The prosecution failed to disclose its possession of this material until queried by the defense. The Second Circuit in its decision held:

> "The most troublesome issue on this appeal arises out of the retention by the prosecution of certain documents belonging to the defendants or their companies without notification to defense counsel. Although we affirm the judgments of conviction, this should not be taken as an indication that we condone what occurred. We do not. We are persuaded only in part by Chief Judge Munson's finding that 'there was no deliberate or intentional misconduct on the part of the prosecutor.' Of greater significance is Judge Munson's finding that appellants were not prejudiced by the prosecution's conduct. Had prejudice occurred, action by this Court might have been more drastic than the criticism implicit in the foregoing discussion."

The Second Circuit based its decision on the District Court's finding of no prejudice to the Petitioners. This decision, however, conflicts with the standard set forth in the Fields case. Fields set forth two alternate standards or reasons for dismissing indictments due to prosecutorial misconduct. Only the first standard related to a finding of prejudice. The second related to the transmission of the concept of fairness and fair play to United States Attorneys when necessary. The Second Circuit in this case never addressed this standard and as such, its decision conflicts with Fields.

This case is most assuredly one where based on the conduct of the prosecutor, dismissal was warranted to inform the prosecutor that such conduct will not be tolerated. The prosecutor possessed defense material for over four months. The material was prepared by the defense for trial. The material in most instances was addressed to defense attorneys. The prosecution read all these documents and copied them. The

prosecution, while knowing full well that the material was defense material, never disclosed to the defense that it possessed these records. Worse yet, the prosecution testified at a pre-trial hearing that it gained new information from a thorough review of these records and planned to use some of this information against the Petitioner, Kenneth E. Moore, Jr., if and when he testified.

The Second Circuit should have granted the relief requested by the Petitioner. It is respectfully prayed that this Court review the misconduct of the prosecutor. Unless settled principles of prosecutorial self-restraint are to be disregarded, this serious error of the Second Circuit ought not to go uncorrected by this Court.

II

THIS CASE PRESENTS EXTREMELY IMPORTANT FEDERAL CONSTITUTIONAL ISSUES WHICH SHOULD BE DECIDED BY THIS COURT.

The Sixth Amendment of the Constitution of the United States guarantees the Petitioners' right to a fair trial. Gideon v. Wainright 372 U.S. 335 (1963).

The Petitioners could not have received a fair trial once the prosecution had the defense material in question. A review by this Court of the entire proceeding will substantiate this statement. The basic concept of our judicial system is fair play. The test of our system of legal jurisprudence should be measured by the interest we take in safeguarding the fundamental rights of the accused. A defendant is entitled to a fair determination of his guilt. Fair trials ensure our concern with due process and contribute to what is the only proper administration of justice. The Petitioners did not receive a fair trial and dismissal was the only

way to prevent the undermining of mockery of justice.

The Sixth Amendment of the United States Constitution also guarantees the right of private communication with counsel. Weatherford v. Bursey 529 U.S. 545 (1977); O'Brien v. U.S. 386 U.S. 345 (1967); Black v. U.S. 385 U.S. 26 (1966); Coplon v. U.S. 191 F2d 749 (D.C. Cir., 1951).

The balance of forces as between accuser and accused is sharply askewed in favor of the accuser if the government is permitted to discover defense strategy and evidence.

The United States Supreme Court addressed this very issue in Black v. U.S. 385 U.S. 26 (1966). In Black, the government obtained information from attorney-client conferences which were later reduced to memoranda for the prosecuting attorneys. The Court held that this intrusion was a violation of the defendant's Sixth Amendment right sufficient to vacate the conviction.

In O'Brien v. U.S. 386 U.S. 345 (1967), the Supreme Court vacated the defendant's conviction due to the government's intrusion into an attorney-client communication which violated the defendant's Sixth Amendment right.

In Weatherford v. Bursey 529 U.S. 545 (1977) the Court recognized that an intrusion into the privilege can unfairly advantage the prosecution and threaten to subvert the adversary system of criminal justice. The Court held that when material or evidence gained from the intrusion is passed on to the prosecution and has produced directly or indirectly any of the evidence offered at trial, the conviction must be vacated.

The United States Supreme Court in U.S. v. Morrison 101 S. Ct. 665 (1981), held that where there has been an intrusion by the government into the attorney-client privilege in violation of the defendant's constitutional rights, the indictment may be dismissed upon a showing of prejudice. The intrusion in question resulted

in the Assistant United States Attorney and his entire investigative force discovering defense strategy and privileged communications. This intrusion has prejudiced the defendant in that it has become impossible to restore the defendant to his position prior to the intrusion. One cannot reach into the minds of the Assistant United States Attorney and his investigative force and remove the knowledge gained by the intrusion. The intrusion so tainted the defendant's right to a fair trial that dismissal was the sole remedy.

III

THIS CASE PRESENTS AN IMPORTANT ISSUE WHICH SHOULD BE SETTLED BY THIS COURT.

It is respectfully submitted that the Second Circuit determined that the prosecution in this case committed acts of misconduct in connection with the defense material in question. The Second Circuit specifically criticized the conduct of the prosecution and noted that the result of the Appeal might have been different upon an express showing of prejudice by the petitioners. The Second Circuit apparently relied upon exising case law which at least in part seems to require a showing of prejudice when prosecutorial misconduct is alleged.

Petitioners respectfully urge this Court that they should not, in instances such as this, be required to show prejudice to the Court. It is extremely inequitable to place the burden of proof concerning prejudice on the Petitioners. This court, upon a review of the factual situation herein, should establish new law requiring

the prosecution to prove that no prejudice resulted from a review of the records. Logic dictates that the burden of proof should be upon the prosecution in cases such as this.

The prosecution reviewed and copied defense material consisting of correspondences with defense attorneys, charts and summaries prepared by the defendants and numerous other documents, all prepared in connection with case preparation. These records, which were contained in a carton, consisted of hundreds of pages. The prosecution, during testimony at a pre-trial hearing, admitted to a review of the records and further admitted it gained additional information from this review. By placing the burden of proof on the Petitioners concerning a showing of prejudice, Petitioners would be required in some way to read the mind of the prosecution to ascertain what information it may have consciously or unconsciously gained from this review. It would seem that an analogy would serve a purpose in connection with this Writ.

If an individual gains access to hundreds of confidential files contained in the United States Supreme Court Chambers and reviews each of these files, the question as to how much or what kind of information this individual may have gained can only come directly from the individual who reviewed the records. The nine justices of this Court would never know what the individual has ascertained or whether or not any of the cases were prejudiced in any fashion without being able to read the mind of the individual who read the records.

The above analogy can be applied to the instant case. There was absolutely no way the petitioner could have ascertained precisely what the prosecution gleaned from a review of the records or in what way, if any, the prosecution could have used or would have used this information against the Petitioners. What Petitioners are suggesting is that in situations such as this, when a prosecutor obtains, retains, withholds, reviews and copies defense

material without notifying the defense it even has such material, the only way the Petitioners could be made whole would be to require the prosecution to prove to the Court that no prejudice has resulted by such conduct.

It is respectfully submitted that this Court should settle such an important question of Federal law at this point in time by determining that in instances such as this where the intrusion into the defense material prepared for trial is so blatent and admitted by the prosecution, the burden of proof concerning the showing of prejudice should shift to the prosecution. The prosecution then should be required to come forward and convince the trial judge that its conduct resulted in no prejudice to the defendants.

Petitioners respectfully pray this court to settle this Federal question of law.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a Writ of Certiorari should be issued to review the decision and order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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February, 1984.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals of the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of December, One Thousand Nine Hundred and Eighty-three.

PRESENT:

HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. JON O. NEWMAN,
Circuit Judges

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KENNETH E. MOORE, III and
KENNETH E. MOORE, JR.,

Defendants-Appellants.

ORDER
83-1083
83-1084

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Kenneth E. Moore, Jr. and Kenneth E. Moore, III appeal from judgments of conviction of the United States District Court for the Northern District of New York which followed a jury trial before Chief Judge Howard G.Munson. Kenneth E. Moore, Jr. was convicted of presenting false claims to the government in violation of 18 U.S.C.

§287. Kenneth E. Moore, III was convicted of perjury before a grand jury in violation of 18 U.S.C. §1623.

The most troublesome issue on this appeal arises out of the retention by the prosecution of certain documents belonging to the defendants or their companies without notification to defense counsel. Although we affirm the judgments of conviction, this should not be taken as an indication that we condone what occurred. We do not. We are persuaded only in part by Chief Judge Munson's finding that "there was no deliberate or intentional misconduct on the part of the prosecutor." Of greater significance is Judge Munson's finding that appellants were not prejudiced by prosecution's conduct. Had prejudice occurred, action by this Court might have been more drastic than the criticism implicit in the foregoing discussion.

We find no merit in appellants' remaining arguments. Appellants have failed to show that substantial prejudice resulted from the district

court's refusal to order a severance, a decision which was discretionary with the court. United States v. Losada, 674 F.2d 167, 171 (2d Cir.), cert. denied, 457 U.S. 1125 (1982). The district court did not err in refusing to instruct the jury that intent to defraud is a necessary element of 18 U.S.C. §287. United States v. Precision Medical Labs., Inc., 593 F.2d 434, 443 (2d Cir. 1978); United States v. Milton, 602 F. 2d 231, 234 (9th Cir. 1979). The district court was in the best position to assess the progress of the jury deliberations, see United States v. Winley, 638 F.2d 560, 561 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982), and appellants have shown no abuse of discretion on the part of the trial judge in denying their motions for mistrial.

Concluding that appellants had a fair trial and that the jury's verdicts had ample support in the evidence, we affirm.

Mandate shall issue forthwith.

/s/ William H. Timbers
Hon. William H. Timbers

/s/
Hon. Ellsworth A. Van Graafeiland

/s/ Jon O. Newman
Hon. Jon O. Newman

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

81-CR-120

KENNETH E. MOORE, JR.,
KENNETH E. MOORE, III
and ANTHONY FREDDOSO,

Defendants.

APPEARANCES:

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ATTORNEYS

HOWARD G. MUNSON, C.J.

MEMORANDUM-DECISION

From January, 1977 until Spring, 1980, Issachar Manufacturing Company, Inc. (Issachar) and Reuben Garment, International, Inc. (Reuben) contracted to supply tents, military clothing and other items for the United States armed forces. The defendants, Kenneth E. Moore, Jr. (Moore, Jr.),

President and Chief Executive Officer of both companies, and Anthony Freddoso, employee and plant supervisor of both companies, were indicted by a federal Grand Jury on November 20, 1981 for allegedly conspiring to defraud the United States Government of approximatley $2.9 million in relation to these government contracts and in violation of Title 18 U.S.C. §371 and 18 U.S.C. §287. Moore Jr. is charged with submitting 134 false claims for progress payments on six manufacturing contracts with the Government in violation of 18 U.S.C. §287. Moore III and Freddoso are charged with knowingly acquiescing in this fraud. Moore III also faces two perjury counts and Freddoso faces one perjury count under Title 18 U.S.C. §1623.

The case was set to go to trial in September, 1982[1]. On September 28, 1982, the defendants filed the present motion alleging violations of defendants' rights under the fourth, fifth and sixth amendments of the Constitution of the United States with regard to the prosecutor's possession

of a box of documents owned by the defendants. The defendants moved to dismiss the indictment against them or, in the alternative, to remove the prosecutor, Assistant United States Attorney Joseph A. Pavone, from this case or to suppress the Government's use of certain evidence at trial. On October 6, 1982, the Government made a motion before this Court to hold Freddoso and the defense attorneys Anthony J. LaFache and Frank Policelli in contempt of court and to compel the production of certain documents which the Government claims were to be turned over to them under Grand Jury subpoena and by the terms of a February 22, 1982 stipulation between the parties.

The Court conducted extensive pretrial hearings on both motions in Utica, New York during the period from October 7, 1982 until October 22, 1982. Upon careful consideration of the merits of both motions, the testimony and documents presented at the hearing, and the memoranda of law submitted by both sides, the Court issued an order on November 12, 1982.

The Court's Order denied that part of defendants' motion which sought to dismiss the indictment or, in the alternative, to remove the prosecutor, and granted that part of the motion which sought to suppress certain evidence. The Court then denied that part of the Government's motion which sought to hold Freddoso, LaFache and Policelli in contempt, and granted that part of the motion which sought to compel the production of those documents listed in Court Exhibit 6.[2]

Accordingly, the Court's Order precluded the Government from introducing into evidence or using for purposes of its direct case or for impeachment purposes specific statements, data, and defense arguments contained in Defense Exhibits A through T (except Defense Exhibit M-1/ Goverment Exhibit 3), Government Exhibit 1 and Court Exhibits 2 through 5, except to the extent that such statements, data, and defense arguments contained therein were elicited and developed by the prosecutor in the Grand Jury investigation of this case. The Court ordered that the prose-

cutor is precluded from using for purposes of its direct case or for purposes of impeaching Moore Jr. the statements, data, and any other information contained in Defense Exhibits O-1 through O-14, the letters of reference for Moore Jr. The Court further ordered the three defendnats to immediately produce and turn over to the prosecutor the documents enumerated in Court Exhibit 6, including Exhibit A-8. The Court's Order set a trial date for November 15, 1982 in Utica. This Memorandum-Decision explains the Court's November 12, 1982 Order, and states the Court's findings of fact and conclusions of law.

THE DEFENDANTS' MOTION

I. Findings of fact

The testimony before this Court reveals a rather confusing and somewhat disturbing set of facts. Each side has alleged misconduct on the part of the other, and has allowed its adversarial zeal to color its view of the other's conduct. The Court is disturbed by the circumstances and opines that neither side has conducted itself as

carefully as it may have; however, the evidence does not present a case of misconduct by either side. The pertinent testimony is as follows.

Defense Exhibits A through T and Court Exhibits 2 through 5 were compiled and prepared by Freddoso, with Moore Jr.'s assistance, at LaFache and Policelli's request and for the purposes of the defendants' upcoming trial. Court Exhibit 2 is a twenty-two (22) page document in which Freddoso sets out certain defenses to the indictment against all the defendants and supports his arguments with specific references to the documents, Defense Exhibits A through T.[3] Court Exhibits 3 through 5 are letters written by Freddoso and Moore Jr. to defense attorney Kenneth P. Ray.[4]

Freddoso testified that in approximately March, 1982 he placed Defense Exhibits A through T into a box.[5] Freddoso placed Court Exhibits 2 through 5 into a legal-sized manila folder on which he wrote in black magic marker "Defense of K.E. Moore, Jr." Freddoso testified that he then placed this manila folder on top of the box con-

taining the other documents. In late March or early April, 1982 Freddoso took the box to LaFache's office. At that time, Freddoso gave LaFache two copies of the 22-page document, one for LaFache and one for Policelli. Freddoso showed LaFache the box and pointed out the various folders and envelopes in the box. Freddoso also gave LaFache a brief description of how each folder and envelope was marked and explained that the 22-page summary referred to the supplemental documents, however, he did not specifically show LaFache the contents of any of the folders. Freddoso then placed the box underneath a bookshelf in a corner to the right of the doorway inside LaFache's office.

According to the testimony of the defendants and their attorneys, the whereabouts of this box became an issue in early September, 1982. On approximately September 7, 1982, Freddoso went to LaFache's office to retrieve the box. Freddoso and LaFache's secretary twice searched LaFache and Ray's offices and did not find the box.

Later in the week LaFache and his secretary also conducted an unsuccessful search for the box. Sometime later, LaFache informed Freddoso that he could not find the box. Upon LaFache's suggestion, Freddoso telephone Policelli on September 22, 1982 to inquire as to the whereabouts of the box. Policelli also unsuccessfully searched his office for the box.

Policelli testified that on September 22, 1982, he had a telphone conversation with Assistant United States Attorney Pavone in which Policelli asked Pavone if he had the box of documents. During that telephone conversation Pavone said that he had come across some materials that he thought might belong to the defendants. Policelli and Pavone arranged for the return of the documents to take place five days later on Monday, September 27, 1982 at the United States Attorney's office in Utica.

On September 27, 1982, Pavone returned the documents, Defense Exhibits A through T, to Policelli and Freddoso. Pavone denied having possession of the 22-page document and Court

Exhibits 3 through 5, the letters to Ray. The primary factual issues before the Court are whether the prosecution ever possessed Court Exhibits 2 through 5 and whether the prosecution illegally came to possess Defense Exhibits A through T.

LaFache testified that he did not remove the box from his office and did not see anyone else do so. However, LaFache also testified that he simply had no "specific recollection" of the box after Freddoso pointed it out to him in late March or early April, 1982.

On April 22, 1982, Pavone and Special Agent Louis Dunlay went to LaFache's office to pick up approximately eighteen boxes of documents which had been turned over to the defense by the terms of the February 22, 1982 stipulation between the parties. Pavone and Dunlay were directed by LaFache to a pile of boxes located on a stairway landing approximately a few feet away from LaFache's office. Pavone and Dunlay piled one box on top of another, and in this fashion, carried a few boxes at a time out to their vehicle.

LaFache testified that he assisted the two men by handing the last five or six boxes to Dunlay who handed them to Pavone. Pavone then placed the boxes in the vehicle. LaFache testified that he and Pavone quickly looked around the offices to make sure that they had retrieved all the boxes, and then they returned to the doorway where Dunlay was waiting.

The defendants assert that Pavone and Dunlay stole the box of documents from LaFache's office on April 22, 1982. However, the testimony shows that neither Pavone nor Dunlay had unrestricted access to the attorneys' offices on April 22, 1982 nor on any other occasion. LaFache and his staff were present on April 22nd, and there is no evidence that Pavone and Dunlay did not properly conduct themselves. There is no clear testimony as to the whereabouts of the box between the time Freddoso came to LaFache's office in the Spring of 1982 and September, 1982. It is clear, however, that Freddoso and perhaps others, including secretaries and cleaning staff, did have unrestricted access to LaFache's offices.

The Court can only conclude that at some time the box was moved to the stairway outside La-Fache's office, and was placed among the pile of approximately eighteen boxes, and that the box was thus inadvertently placed in the hands of the prosecutor on April 22, 1982.

The Government claims that it was unaware of the presence of the box until September, 1982. The Government introduced the testimony of two janitors[6] employed at the Federal Courthouse in Utica where the United States Attorney's office is located. The janitors testified that they found a box outside the United States Attorney's office and, without ever viewing its contents, they placed the box inside the office. The Court finds that the entire testimony by these janitors was inconsistent and, at points, incredible. Neither janitor ever looked inside the box, yet each insisted he could identify the contents. Each janitor's account of the particular date upon which this event occurred differed. The first janitor's testimony with regard to the date

was later discredited by information introduced by the United States Attorney's office. The Court is convinced that there is no factual support for the Government's contention that the defendants purposefully, and with the intent to delay the trial, planted the box outside the United States Attorney's office in Utica, and the court rejects this theory in full.

The Court finds credible the prosecutor's testimony that he was not aware of the box until September, and did not ever view the 22-page document. The prosecutor admits that he looked through the box in the belief that the Government was entitled to possession of Defense Exhibits A through J and L through T under the terms of the Grand Jury subpoena. Upon viewing Defense Exhibit K, the prosecutor believed that he had seen this group of documents among the thousands of case-related documents already in the possession of the prosecution.

The prosecutor requested that a student assistant in the United States Attorney's office

in Syracuse photocopy the documents. This part-time assistant testified that she remembered being given a pile of documents which she photocopied over the period of five or six days after September 13, 1982. The testimony of David Roll, an auditor with the Defense Contract Auditing Agency investigating this case, shows that he was telephoned by Pavone on September 15, 1982. Pavone described the documents to Roll, but Roll was unable to determine if the documents belonged to the Government. Roll was not able to come to Utica until September 20, 1982 at which time he determined that the documents were not the Government's records or "work product." However, Roll did determine that certain documents were corporate records that should have been turned over to the prosecution under the Grand Jury subpoena.

II. Conclusions of Law

A. Fourth Amendment Claims

The Fourth amendment of the Constitution of

the United States guarantees "(t)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . ." It is elemental that the police activity at issue must constitute a "search" or "seizure." See W.R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment 221 (1978). "A search is a probing exploration for something that is concealed or hidden from the searcher; a seizure is a forcible or secretive dispossession of something against the will of the possessor or owner." United States v. Marti, 321 F. Supp. 59 (E.D.N.Y. 1970).

In the instant case, there was no probing exploration by the prosecutor, nor was there any forcible or secretive dispossession. In fact, the box was inadvertently placed in the hands of the prosecution when Pavone and Dunlay lawfully and with permission retrieved the approximately eighteen other boxes of documents from LaFache's law office. In this document-laden case, it is not unreasonable that the prosecutor did not im-

mediately recognize the documents. Once Roll was called in and determined that certain of the documents should not be in the Government's possession, those documents were returned to Policelli and Freddoso in Utica on a mutually convenient date. Defendants' fourth amendment claim is not substantiated by the facts and is, therefore, denied.

B. Fifth Amendment Claim

The defendants' fifth amendment claim is that: "(t)he prosecution's obtaining of this information would, in essence, force the defendants to testify to correct the interpretation the prosecution may give to this evidence. . . (in) violation of the . . . right against self-incrimination." The fifth amendment of the Constitution of the United States ensures that no person" . . . shall be compelled in any criminal case to be a witness against himself. . . ." The fifth amendment protects a person against his compelled testimonial incrimination. United States of America and Arthur Lott of the Internal

Revenue Service v. William J. Krawczuk, Misc. No. 113 (N.D.N.Y. June 8, 1977)(Memorandum-Decision and Order)(Munson, C.J.)(citing Fisher v. United States, 425 U.S. 391 (1976); 8 Wigmore, Evidence §2264 (McNaughton Rev. 1961)). A defendant cannot claim a denial of his fifth amendment right against compelled self-incrimination where he voluntarily takes the witness stand to offer testimony to respond to or to counter the evidence offered against him. See United States v. Burreson, 643 F.2d 1344, 1350 (9th Cir. 1981), cert. denied, 454 U.S. 847 (1981) and Channell v. United States, 454 U.S. 830(1981); United States v. Carleo, 576 F.2d 846, 850 (10th Cir. 1978), cert. denied 439 U.S. 850 (1978); United States ex. rel. Pendergrass v. Anderson, 304 F. Supp. 577, 578 (D. Del. 1969); United States v. Hearst 563 F.2d 1331, 1343 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978).

The defendants fail to state a cognizable fifth amendment claim. Furthermore, there is no evidence that these defendants are being compelled

to take the stand to testify against themselves. Thus, defendants' fifth amendment claim is denied.

C. Attorney-Client Privilege and Work-Product Privilege

The defendants claim that the documents, Defense Exhibits A through T and Court Exhibits 2 through 6, are communications protected by the attorney-client privilege and the work-product privilege and that the documents were nondiscoverable under Rule 16 Fed. R. Crim. P. The attorney-client privilege only applies if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Colton v. United States, 306 F.2d 633, 637 (2d Cir. 1962)-(quoting United States v. United Shoe

Machine Corp., 89 F. Supp. 357, 358-359 (D. Mass. 1950); prob. juris noted, 346 U.S. 894 (1953).

The Court has inspected all of the documents in camera, and concludes that certain documents are covered by the attorney-client privilege and are nondiscoverable under Rule 16(b)(2). Court Exhibits 2 through 5 are covered by the privilege because they are letters and memorandum prepared and confidentially communicated by the defendants as "clients" to their already retained attorney for the purposes of securing legal advice and assistance with regard to the defense of this case, and the attorneys here were acting in their capacities as attorneys in this regard. Similarly, certain other documents within the group of Defense Exhibits A through T are protected because they are private letters by the defendants as clients to their retained Philadelphia legal counsel communicated for the purpose of obtaining legal advice and assistance concerning the Government's investigation of this particular case.

Furthermore, the charts and other documents supporting the 22-page document which were already

in existence and were simply collated by Freddoso or the other defendants to be turned over to their attorneys do not fall within this class of privileged communications. See Colton v. United States, 306 F.2d at 639. The reason for this differentiation is clear:

> Insofar as the papers include pre-existing documents and financial records not prepared by the (defendants) for the purpose of communicating with their lawyers in confidence, their contents have acquired no special protection from the simple fact of being turned over to an attorney. . . . Any other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney.

Id.

It would appear that such pre-exising corporate documents would have been available to the Government pursuant to the reciprocal discovery rights under Rule 16 Fed. R. Crim. P. Nor would such pre-existing documents fall within the protection of the work-product privilege. See, e.g., In Re Grand Jury Proceedings 601 F2d 162, 171 n.7 (5th Cir. 1979)(citing

Fisher v. United States, 425 U.S. 391, 403-404 (1976).

E. Denial of Counsel and Fair Trial Claims

The sixth amendment of the Constitution of the United States guarantees the defendants' rights to the effective assistance of counsel and a fair trial.[7] Gideon v. Wainright, 372 U.S. 335, 344 (1963); United States v. Morrison, 449 U.S. 361 (1981), reh. denied, 101 S. Ct. 1420 (1981). As stated in Morrison, 449 U.S. at 364, "(the) cases have accordingly, been responsive to proved claims that governmental conduct has rendered counsel's assistance to the defendant ineffective."[8]

The defendants argue that the Government's obtaining and viewing the privileged documents has or will have the effect of denying the defendants a fair trial and the effective assistance of counsel. The defendants urge this Court to dismiss the indictment against them or, in the alternative, to dismiss the prosecutor or preclude the use of the evidence at trial.

Dismissal of an indictment is "so drastic" a remedy that it "must be reserved for the truly extreme cases." United States v. Broward, 594 F.2d 345 (2d Cir. 1979), cert. denied, 442 U.S. 941 (1979). "A district court does not have the power to dismiss a legally sufficient indictment simply because it deems the dismissal to be in the interests of justice." United States v. Brown, 602 F. 2d 1073, 1076 (2d Cir. 1979), cert. denied,444 U.S. 952 (1979). The standard for dismissal was clearly set forth in United States v. Fields, 592 F. 2d 638, 647-648 (2d. Cir. 1979), cert. denied, 442 U.S. 917 (1979) and again, more recently, in United States v. Artuso, 618 F.2d 192, 196 (2d Cir. 1980), cert denied, 449 U.S. 861 (1980):

> The extreme sanction of dismissal of an indictment is justified in order to achieve one or both of two objectives: first, to eliminate prejudice to a defendant in a criminal prosecution; second, to 'help to translate the assurances of the United States Attorneys into consistent performance by their assistants.'

With regard to the deterrence objective it is clear that: "(e)ven when a prosecutorial arm of the government unlawfully obtains evidence, (the courts) normally limit the permissible sanction to suppression of the illegally obtained evidence. It is only in the rare case, where it is impossible to restore a criminal defendant to the position that he would have occupied vis-a-vis the prosecutor, that the indictment may be dismissed." United States v. Field, 592 F.2d at 648. "(P)roper regard for the public interest in the prosecution of crimes counsels restraint in dismissing an indictment for deterrence purposes unless the course of official misconduct is a demonstrated, long-standing one. (The courts) have approved this extreme sanction only when the pattern of misconduct is widespread or continuous." Id. at 648; United States v. Estepa,[9] 471 F.2d 1132, 1137 (2d Cir. 1972); United States v. Jacobs,[10] 531 F.2d 87, 90 (2d Cir. 1976), vacated and remanded, 429 U.S. 909, aff'd on remand, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978).

The Court finds here that there was no deliberate or intentional misconduct on the part of the prosecutor in obtaining and viewing the documents. Therefore, no deterrence purpose would be served by the Court's dismissal of the indictment. The pivotal issue before the Court is, however, whether there is sufficient prejudice resulting from the Government's nondeliberate exposure to these privileged attorney-client communications to warrant dismissal of the indictment. "(A)bsent demonstrable prejudice, or substantial threat thereof, the dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." United States v. Morrison, 449 U.S. at 365.

Courts since Morrison have addressed the issue of whether prejudice has resulted from the violation of defendant's sixth amendment rights and whether dismissal is the correspondingly appropriate remedy. For example, the Fifth Circuit in United States v. Killian and Brumk, 639 F.2d 206, 210 (5th Cir. 1981), cert. denied, 451 U.S.

1021 (1981), held that while the conduct of the federal authorities in removing defendant from jail to question him was highly improper and unethical, the statements that were transcribed and any evidence that might have been obtained from the statements were not introduced by the prosecution at trial, and therefore, no prejudice occurred. The Killian court noted that had the Government not independently decided not to use the information at trial, the appropriate sanction by the court would probably have been suppression. Id. In any event, dismissal was "too drastic and totally unnecessary" a remedy. Id.

Again, in United States v. Cross, 638 F.2d 1375 (5th Cir. 1981), the Court found that the conduct of the Federal Bureau of Investigation (F.B.I.) agents, apparently approved by the United States Attorney, in communicating with defendant before trial without approval of defense counsel and prevailing upon defendant to take a polygraph test represented a grossly improper breach of defendant's relationship with

his trial counsel. The Court found that dismissal of the indictment was not the proper remedy. First, because there was not evidence that the F.B.I. agent intentionally sought to destroy the defendant's attorney-client relationship. The second and more important basis for the Court's decision to uphold the indictment was the Court's finding that the suppression of the evidence headed off any potential prejudice to the defendant from the Government's conduct. Absent such prejudice, dismissal was an inappropriate remedy. Id. at 1379.

The Third Circuit in United States v. Pantone v. Kumer, 634 F.2d 716 (3rd Cir. 1980) dealt with the issue of whether the prosecutor's knowledge of certain incriminating evidence, i.e., immunized Grand jury testimony which was obtained after a first trial conviction, but prior to a remanded and second trial, which provided the prosecutor with a degree of psychological confidence about the outcome of the second trial which he might not have had if he had not seen the privileged information was grounds for dismissal of

the indictment or removal of the prosecutor. The Court found that the "potential motivational effect" failed to rise to the level of constitutional significance. The record before the Pantone court did not indicate that the United States Attorney "learned anything new from the grand jury testimony - certainly nothing beneficial to the prosecution or inconsistent with its position at the original trial." The Court found that the prosecutor "relied solely on independent sources of information in conducting the retrial." Id. at 722.

In the instant case, the Court finds that there is no discernible prejudice to the defendants resulting from the prosecutor's viewing, photocopying, and briefly retaining possession of Defense Exhibits A through T. Only certain of these documents are protected by the attorney-client privilege, and as in Cross, there was no intentional infringement of the attorney-client privilege. With the permission of both sides, the Court has viewed all of the documents

in camera. The Court also, with the permission of both sides, reviewed the Grand Jury testimony of two of the defendants in order to determine to what extent the prosecutor knew specific data, defense arguments, and other information relating to this case prior to his viewing the documents.

The Court finds that the data, statements, defense arguments, and other information in these documents were previously included in the Grand Jury testimony of these two defendants. The prosecutor's questions to the defendants before the Grand Jury clearly show that, at that stage of the investigation of this case, the prosecutor was anticipating the arguments that would be used by the defense at trial. For example, the Grand Jury testimony of the two defendants is replete with references to the defense argument that the company's bookkeeper and Assistant to the President was solely responsible for the submission of false claims to the Government. The Grand Jury testimony clearly sets out the

defense argument that certain named government officials had a "vendetta" against the defendants and were conspiring to drive the defendant Moore Jr. out of business. Much of this revealing testimony was given in response to the prosecutor's specific questions. Other portions of the testimony were freely and openly offered by the defendants in an effort to defend their own actions and the actions of their codefendant.

Thus, the Court must conclude that the Assistant United States Attorney was well aware of the information contained in these documents and that as in Pantone no psychological or motivational advantage has resulted to the Government. No prejudice or substantial threat of prejudice has, therefore, accured to the defendants as a result of the prosecutor's seeing these documents. Accordingly, neither the dismissal of the indictment, nor dismissal of the prosecutor, is warranted. The Court's November 12, 1982 Order which suppresses the prosecutor's

use of these doucments at trial, for purposes of its direct case and for impeachment purposes, will clearly prevent even the most minute possibility that the defendants will suffer any prejudice from what has occurred.

FOOTNOTES

[1]The trial was scheduled for July 19, 1982 after this Court denied defendants' pretrial motions for: dismissal, suppression of certain statements, a bill of particulars, and severance of Moore Jr.'s trial, inspection of Grand Jury minutes and a list of Government witnesses.

[2]Court Exhibit 6 is a "packing list" of documents subpoenaed by the Grand Jury. The list distinguishes those subpoenaed documents which were never turned over by the defendants and those documents which were turned over and then were returned to the defendants pursuant to the February 22 stipulation.

[3]Defense Exhibits A through T are folders containing charts, checks, and other documents or corporate records. Each document in each folder is marked with an additional exhibit number, i.e., each document in folder A is marked A-1, A-2, etc. The Court will refer throughout this opinion to Defense Exhibit A, for example, and in doing so, intends to include all the documents in that folder.

[4]After examining these documents in camera, the Court finds that Court Exhibits 3 through 5 are letters written by the defendants to their attorney Kenneth P. Ray, LaFache's partner. Court Exhibit 3 is a seven page letter dated August 10, 1981. Court Exhibit 4 is a twenty-one page letter dated July 31, 1981. Court Exhibit 5 is a three page letter dated August 25, 1981 on Reuben International Company Inc. letterhead and signed "Tony." Attached to that letter is a news article.

[5]There is some debate as to the type of box into which the documents were placed. Freddoso testified that he vaguely remembered that the box was a Schweppes soda box that had no cover. The box, in which the documents were introduced at

trial, is a Xerox box with a cover. The Court finds that there is no other evidence nor any specific recollection by Freddoso to resolve this factual dispute. It is possible that the documents were removed from the original box and placed into another box by either the defendants or the prosecution. However, the point seems to this Court to be an insignificant one.

[6]Testimony was introduced showing that both janitors have mental and physical problems which affect their memories and their ability to communicate and, therefore, their ability to competently testify. The Court has heard the testimony of both janitors. Other subsequent testimony and information from the United States Attorney offered in chambers would indicate to this Court that the testimony of these two witnesses is not accurate or credible. It appears that the two janitors are friends; they have discussed this situation and each seems to have been influenced by the other's memory of the event.

[7]The Sixth Amendment provides that: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

[8]The Supreme Court in its recent decision in United States v. Morrison, 449 U.S. at 364-365 presents a thorough survey of the case law on the subject of sixth amendment violations and the suitable remedies for such constitutional deprivations:

(W)ithout detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not necessarily infringe on competing interests. Our relevant cases reflect this approach. In Gideon v. Wainwright the defendant was totally denied the assistance of counsel at his criminal trial. In Geders v. United States, Herring v. New York and Powell v. Alabama, judicial action before or during trial prevented counsel from being fully effective. In Black v. United States and O'Brien v. United States law enforcement officers improperly overheard pretrial conversations between a defendant and his lawyer. None of these deprivations, however, resulted in the dismissal of the indictment. Rather, the conviction in each case was reversed and the government was free to proceed with a new trial. Similarly, when before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been

> wrongfully admitted and the defendant convicted. In addition, certain violations of the right to counsel may be disregarded as harmless error.

(Citations omitted)

The Morrison Court concludes that the courts' "approach has thus been to identify and then neutralize the taint by tailoring suitable relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial."

[9]In United States v. Estepa, the Court dismissed the indictment against the defendant because the United States Attorney allowed the Grand Jury testimony to be based upon hearsay. In light of the Court's prior admonitions and the United States Attorney's assurances that their assistants would comply, the court found reversal of the conviction and dismissal of the indictment was the only way to guarantee that future violations would not occur.

[10]In United States v. Jacobs, the Court dismissed Count 2 of the indictment against the defendant who was not warned by the Strike Force Attorney that she was a target of the Grand Jury and that she, therefore, had a right to remain silent. Defendant was questioned about an incriminating telephone conversation of which the Strike Force Attorney had taped evidence. The Court held that in light of the United States Attorney's policy of advising potential defendants that they are targets and in light of the Court's earlier decision upholding the Strike Force Attorney's right to appear before the Grand Jury on the basis that they are supervised by the U.S. Attorney's Office, the Court found a conflict of criminal procedure within the district which prevented the achievement of "uniform justice" and fell outside the "penumbra of fair play."

In another case, United States v. Brown, 602 F.2d 1073, 1074 (2d Cir. 1979), cert. denied, 444 U.S. 952 (1979), the court refused to dismiss the indictment, finding that there was no showing that the government's "less than exemplary system for supervising" an informant was representative of government conduct that was "widespread or continuous."

No. 83-1350

In the Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH E. MOORE, III AND
KENNETH E. MOORE, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

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QUESTION PRESENTED

Whether the government's acquisition of privileged defense materials required dismissal of the indictment, even in the absence of prejudice or intentional misconduct by the prosecutor.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-4a) and the district court (Pet. App. 5a-38a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1983, and the petition for a writ of certiorari was filed on February 13, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner Moore, Jr. was convicted of conspiring to defraud the government by filing false payment claims in connection with government defense contracts, in violation of 18 U.S.C. 371, and

on 11 false claims counts, in violation of 18 U.S.C. 287. Petitioner Moore, III was convicted on one count of perjury before the grand jury, in violation of 18 U.S.C. 1623.[1] Moore, Jr. was sentenced to a six-month term of imprisonment and to a $55,000 fine. Moore, III was sentenced to two years' probation and to a $2,000 fine. The court of appeals affirmed the convictions (Pet. App. 1a-3a).

1. The evidence at trial showed that between 1977 and 1980, petitioners, who are father and son, owned and managed Issachar Manufacturing Co. (Issachar) and Reuben Garment International Co. (Reuben) in Little Falls, New York. The sole source of business for both companies was government defense contracts. Issachar manufactured military clothing, and Reuben produced tents and related equipment (Tr. 211-212, 931-937).[2] On certain of the defense contracts held by Issachar, Moore, Jr. filed a series of false claims for progress payments that misrepresented expenses allegedly incurred by the company for materials, and payments were made on the basis of those false claims (Tr. 1041-1044, 1053-1060, 2273). Issachar and Reuben ultimately defaulted on two defense contracts, which resulted in a loss to the government of approximately $2.9 million (Tr. 2384-2387). In addition, during the investigation in this case, Moore, III lied to the grand jury concerning $1,000 that had been improperly diverted from one of petitioners' companies (Tr. 663-665, 981-983, 1089-1092, 2198-2209).

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[1]Moore, Jr. was acquitted on 123 false claims counts, and the district court granted his motion for a judgment of acquittal on the conspiracy count and on one perjury count. Co-defendant Anthony Freddoso was acquitted on the two counts (conspiracy and perjury) against him.

[2]Petitioners also owned and operated three other related companies that were financed strictly with funds derived from government payments to Issachar and Reuben (Tr. 1245-1266, 2373-2374).

2. a. On the eve of trial in September 1982, petitioners and co-defendant Freddoso moved the district court to dismiss the indictment on the ground that the prosecutor allegedly had improperly obtained and retained a box containing documents compiled by Freddoso and Moore, Jr. to assist in their defense. The facts adduced at the hearing on that motion, as summarized in the district court's opinion (Pet. App. 5a-17a), showed that in late March or early April 1982, Freddoso brought to attorney Anthony J. LaFache's office certain documents he had prepared to assist in the defense. Most of the documents (Defense Exhibits A-T) were contained in a cardboard box, and other documents (Court Exhibits 2-5) were contained in a separate folder that was placed on top of the box.[3] Freddoso left the box and folder in a corner of LaFache's office. A few weeks later, the prosecutor and an FBI agent went to LaFache's office to pick up documents that the government previously had provided to the defense team. LaFache directed them to approximately 18 boxes piled on a stairway landing a few feet from LaFache's office. With LaFache's assistance, the prosecutor and FBI agent loaded the boxes into a government vehicle (Pet. App. 9a-14a).

Approximately five months later, in September 1982, co-defendant Freddoso went to LaFache's office to retrieve the box of defense materials, but it could not be found in the office of any of the defense counsel. On September 22, 1982, defense counsel called the prosecutor concerning the box

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[3]As described by the district court (Pet. App. 10a & n.3), Defense Exhibits A-T are folders containing charts, checks, and other documents or corporate records. Court Exhibit 2 is a "twenty-two (22) page document in which Freddoso sets out certain defenses to the indictment against all the defendants and supports his arguments with specific references" to Defense Exhibits A-T. Court Exhibits 3-5 are letters written by Freddoso and Moore, Jr. to defense attorney Kenneth P. Ray, LaFache's partner.

and was informed that the prosecutor had come across some materials that he believed might belong to the defendants. Five days later, defense counsel picked up the box containing Defense Exhibits A-T at the United States Attorney's Office. The prosecutor denied having possession of the folder containing Court Exhibits 2-5. The prosecutor also represented that he was unaware of the government's possession of the box until September 1982 and that he did not immediately distinguish the documents contained in the box from the thousands of documents that had been produced by the defendants pursuant to grand jury subpoena (Pet. App. 14a-17a).

b. Following an eight-day hearing, the district court entered an order barring the government from using on its direct case or for impeachment specific statements, data, or defense arguments contained in the documents (with the exception of Defense Exhibit M-1), except to the extent the contents had been independently elicited and developed by the prosecution in connection with the case (Pet. App. 8a-9a). However, the court denied petitioner's motion to dismiss the indictment. Finding that the evidence "does not present a case of misconduct by either side," the court rejected the government's argument that the defense had planted the defense materials in the United States Attorney's Office, and likewise rejected the defense claim that the government had stolen the materials (Pet. App. 10a, 14a-16a). The court instead held that "the box [in issue] was inadvertently placed in the hands of the prosecution when [the prosecutor and FBI agent] lawfully and with permission retrieved the approximately eighteen other boxes of documents from LaFache's law office" (*id.* at 18a). The court also credited the prosecutor's testimony that he was not aware of the box until September, that he did not immediately recognize the documents, and that he never viewed Court Exhibit 2, which was the 22-page document in

which co-defendant Freddoso set out certain defenses, supported by references to the documents contained in the box of defense exhibits (*id.* at 16a, 18a-19a).[4]

In addition, although the court concluded that a number of the documents contained in the box were merely "pre-existing corporate documents [that] would have been available to the Government" pursuant to Rule 16 of the Federal Rules of Criminal Procedure, it held that the documents contained in the separate folder (Court Exhibits 2-5) and certain documents in the box constituted privileged, non-discoverable material (Pet. App. 22a-23a). The court, however, rejected defendants' contention that the government's access to the privileged documents required dismissal of the indictment.

The court found that "there was no deliberate or intentional misconduct on the part of the prosecutor in obtaining and viewing the documents," and it therefore concluded that "no deterrence purpose would be served by * * * dismissal of the indictment" (Pet. App. 27a). Moreover, the court held that under *United States* v. *Morrison*, 449 U.S. 361 (1981), the prosecutor's unintentional exposure to the privileged materials did not warrant dismissal because there was "[n]o prejudice or substantial threat of prejudice" to the

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[4]The court also recounted the testimony of an auditor with the Defense Contract Auditing Agency that he was telephoned by the prosecutor on September 15, 1982 but was unable to determine from the prosecutor's description over the telephone whether the documents belonged to the government. The auditor was unable to go to Utica to inspect the documents until September 20, at which time he determined that the documents were not the government's records but that certain of them were corporate records that should have been turned over in response to the grand jury subpoena. Pet. App. 17a. The court observed that "[o]nce [the auditor] was called in and determined that certain of the documents should not be in the Government's possession, those documents were returned to Policelli and Freddoso in Utica on a mutually convenient date" (*id.* at 19a).

defense (Pet. App. 27a, 32a). The court explained (*id.* at 30a-32a) that the information contained in the documents had been disclosed by the defendants during their grand jury testimony and that the court's own review of the grand jury proceedings established that the prosecutor was "well aware" of the information at that stage of the case. Finally, the court noted that its order prohibiting the government from using the documents at trial for any purpose "will clearly prevent even the most minute possibility that the defendants will suffer any prejudice from what has occurred" (*id.* at 32a-33a).

3. The court of appeals affirmed (Pet. App. 1a-4a). The court stated that although it did not condone the prosecutor's retention of the defense documents without notifying counsel, it affirmed the convictions on the basis of the district court's findings that " 'there was no deliberate or intentional misconduct on the part of the prosecutor' " and, "[o]f greater significance," that "[petitioners] were not prejudiced by [the] prosecution's conduct" (Pet. App. 2a).

ARGUMENT

The courts below addressed the unfortunate incident that occurred in this case with care and sensitivity. Their treatment of the issue was correct and does not conflict with any decision of this Court or any court of appeals. Further review of this fact-bound issue therefore is not warranted.

1. Petitioners contend (Pet. 10-13) that the indictment should be dismissed because they "could not have received a fair trial once the prosecution had the defense material in question" (Pet. 10). This contention is belied by the concurrent finding by the courts below that "[petitioners] were not prejudiced by [the] prosecution's conduct" (Pet. App. 2a). As the district court pointed out, the prosecution was already "well aware of the information contained in [the] documents [in question]," and therefore gained no advantage from them (Pet. App. 32a). Moreover, as the district

court further noted, the prosecution was prohibited from using the documents in question at trial, thereby "prevent-[ing] even the most minute possibility that [petitioners could have] suffer[ed] any prejudice" (*id.* at 32a-33a). Petitioners cite nothing to suggest that the district court's suppression of the documents and information contained in them was insufficient to prevent any prejudice from resulting or that the determination by the courts below that petitioners in fact suffered no prejudice was erroneous.

Especially in light of these findings, the decisions of this Court relied upon by petitioners (Pet. 12-13) plainly do not support their contention that the indictment should be dismissed. In *Black* v. *United States,* 385 U.S. 26 (1966), and *O'Brien* v. *United States,* 386 U.S. 345 (1967), there had been surreptitious electronic surveillance by the government of attorney-client communications, in violation not only of the attorney-client privilege but of the Fourth Amendment. In each case, the conviction was reversed and a new trial ordered; the court did not, however, order the indictment dismissed, as petitioners urge here. Moreover, in *Black,* even the more limited relief of a new trial was ordered only "so as to afford the petitioner an opportunity to protect himself from the use of evidence that might be otherwise inadmissible" and to enable the district court to pass on the question, since that court had not known of the surveillance at the time of trial. 385 U.S. at 29. In *O'Brien,* the Court did not write further, but simply cited *Black.* 386 U.S. at 345. Thus, as this Court subsequently has made clear, a new trial was ordered in *Black* and *O'Brien* only because of the possibility that the illegal surveillance might have had an effect on the trials. See *Weatherford* v. *Bursey,* 429 U.S. 545, 551-552 (1977). "If anything is to be inferred from these two cases with respect to the right to counsel, it is that when conversations with counsel have been overheard, the constitutionality of the conviction depends on whether

the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." *Id.* at 552.

Here, unlike in *Black*, the trial court was informed prior to trial of the prosecution's access to defense materials, which, furthermore, was not the product of any unlawful search. The court then held extensive hearings on the question, barred the use of the materials at trial, and found that petitioners were not prejudiced by the incident. Since here, unlike in *Black* and *O'Brien*, the district court took measures prior to trial to assure that the incident would have no effect on the trial, there is no basis in this case even for the more limited relief of a new trial ordered in *Black* and *O'Brien*. Indeed, it would be pointless to order a new trial, because petitioners have not suggested any additional measures not taken at the first trial that the district court might take at a second trial to guard against use of the materials.

Nor does *Weatherford* v. *Bursey, supra*, upon which petitioners also rely (Pet. 12), support their position. That case was a damage action under 42 U.S.C. (Supp. V) 1983 based on an informant's presence at a conversation between a criminal defendant and his lawyer. The Court held that there had been no Sixth Amendment violation at all, because there was no tainted evidence in the case, no purposeful intrusion, and no communication of information to the prosecution. 429 U.S. at 554-559. Here, too, there was no tainted evidence used at trial, and the courts below found no intentional misconduct by the prosecutor (Pet. App. 2a-27a). Although here, unlike in *Weatherford*, the prosecutor did have the documents in his possession, the district court found that the prosecutor was previously "well aware of the information contained in these documents" and that accordingly "[n]o prejudice or substantial threat of prejudice" resulted (Pet. App. 32a). In these circumstances, there is no reason to doubt that the district court's ruling barring

the use of the materials was fully sufficient to remedy whatever Sixth Amendment violation might have occurred under *Weatherford* v. *Bursey, supra,* as a result of the prosecutor's possession of the documents.

The fourth of this Court's decisions upon which petitioners rely, *United States* v. *Morrison,* 449 U.S. 361 (1981) (see Pet. 12), actually reinforces the conclusion that neither dismissal of the indictment nor a new trial is appropriate in this case. The Court stressed in *Morrison* that the remedy for a Sixth Amendment violation "should be tailored to the injury suffered" and should not unnecessarily infringe upon the competing interest in the administration of criminal justice. 449 U.S. at 364. Thus, where evidence has been obtained in violation of the Sixth Amendment, the appropriate remedy is to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted at trial. *Id.* at 364-365. "Absent such impact on the criminal proceeding, however, there is no basis for imposing a remedy in that proceeding * * *. More particularly, absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *Id.* at 365 (footnote omitted). Since the courts below found no prejudice or substantial threat thereof and since the documents obtained were in any event suppressed, there is no basis for dismissing the indictment or for imposing any other remedy in the instant proceedings even if, contrary to the finding below, the prosecutor's acquisition of the materials had been deliberate.[5]

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[5]Petitioners acknowledge (Pet. 14) that existing case law seems to require a showing of prejudice when prosecutorial misconduct is alleged (see also *Smith* v. *Phillips,* 455 U.S. 209, 219-220 (1982); *United States* v. *Agurs,* 427 U.S. 97, 110 (1976)), but they urge the Court to make "new law" by placing the burden on the prosecutor to show an absence of prejudice in order to avoid the need for the court to "read the mind of the prosecution" (Pet. 15). This case would not furnish an appropriate

2. Petitioners contend (Pet. 6-9) that the indictment should have been dismissed in this case under a prior Second Circuit decision indicating that that remedy might be available, even if the defendant was not irreparably injured, in order to " 'help translate the assurances of [the] U. S. attorneys into consistent performance by their assistants.' " Pet. 7 (quoting *United States* v. *Fields*, 592 F.2d 638, 647 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979), and *United States* v. *Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972)). But whether the court of appeals should have followed dicta in a prior opinion concerning the appropriate exercise of its supervisory power obviously presents no question for review by this Court. Moreover, the Second Circuit stressed in *Fields* that dismissal would be appropriate "only when the pattern of misconduct is widespread or continuous." 592 F.2d at 648. Even assuming a court may dismiss an indictment on this ground (but cf. *United States* v. *Morrison*, 449 U.S. at 366 n.2), there is no basis for such drastic action here. There was no deliberate or intentional official misconduct in this case, as both courts below held, let alone any pattern of " 'widespread or continuous' " misconduct. Compare *United States* v. *Brown*, 602 F.2d 1073, 1078 (2d Cir.), cert. denied, 444 U.S. 952 (1979).

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vehicle for consideration of this novel submission even if the Court were disposed to consider abandoning its precedents requiring that the defendant show prejudice in order to obtain relief. Irrespective of who might bear the burden of proof, the courts below found that no prejudice resulted in this case. And as noted above (see pages 5-6, *supra*), the district court's finding that no prejudice resulted was in turn based upon that court's own review of the documents and grand jury proceedings, which demonstrated that the government learned nothing new, and gained no advantage, from the defense documents. Thus, it was not necessary to read the mind of the prosecutor. Moreover, the rule petitioners urge would be especially inappropriate where, as here, the prosecutor's acquisition of the materials was found to be unintentional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1984

DOJ-1984-05